

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOSEPHINE RIVERS)	
Claimant)	
VS.)	
)	Docket Nos. 189,073
ATCHISON HOSPITAL)	& 189,687
Respondent)	
AND)	
)	
INSURANCE COMPANY OF NORTH AMERICA & PHICO INSURANCE COMPANY)	
Insurance Carriers)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Claimant requested review of the May 21, 1996, Award entered by Special Administrative Law Judge Douglas F. Martin. The Appeals Board heard oral argument on September 17, 1996, in Kansas City, Kansas.

APPEARANCES

Claimant appeared by her attorney, Jan L. Fisher of Topeka, Kansas. Respondent and Insurance Company of North America (INA) appeared by their attorney, Marcia L. Yates of Kansas City, Missouri. Respondent and PHICO Insurance Company appeared by their attorney Bill W. Richerson appearing for Jeffrey S. Austin of Overland Park, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Darin M. Conklin of Topeka, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board adopts the parties' stipulations as listed in the Award. Included in the stipulations was the agreement that respondent was insured by PHICO Insurance Company for the injury date of February 1, 1993, and the series of injuries through March 2, 1994, which is Docket No. 189,687. Although not mentioned in the Award, it is apparent that INA covered respondent at the time of the first accident on July 26, 1992, which is the subject of Docket No. 189,073. Also, during oral argument counsel for respondent and INA announced that they were abandoning their claim against the Workers Compensation Fund (Fund) in Docket No. 189,073. The Fund remains in that case, however, for the purpose of pursuing its claim for attorney fees.

The record enumerated in the May 21, 1996, Award of Special Administrative Law Judge Martin refers to depositions of Daniel D. Zimmerman, M.D., John B. Moore, IV, M.D., and Thomas Lynn Shriwise, M.D. Although the record does contain a deposition of Dr. Shriwise, it does not contain depositions of Drs. Zimmerman and Moore. No such depositions are listed in the submission letters of any party. In addition to the regular hearing transcript, the depositions contained in the record of these docketed claims are as follows: Thomas L. Shriwise, M.D., taken December 13, 1995; Vito J. Carabetta, M.D., taken November 30, 1995; P. Brent Koprivica, M.D., taken August 30, 1995; P. Brent Koprivica taken November 20, 1995; John R. Eplee, M.D., taken October 5, 1995; Josephine Rivers taken October 2, 1995; and Dick Santner taken October 2, 1995. Also, the record in the Award refers to a regular hearing date of July 11, 1995. The regular hearing was actually heard on August 2, 1995.

The Special Administrative Law Judge specifically refers to the August 2, 1995, regular hearing, and the depositions of Drs. Eplee, Koprivica, Carabetta, Shriwise, and Dick Santner in the body of his Award. Accordingly, the Appeals Board concludes that the Special Administrative Law Judge did review the proper record and that the recitation of the record contained in the Award was a transcriptional error only.

ISSUES

This appeal involves two separately docketed claims. In Docket No. 189,073 claimant alleged injury to her left shoulder, left arm, and mid-back by accident of July 26, 1992. In Docket No. 189,687, claimant originally alleged injury from a series of accidents through February 1, 1993. This was later amended to allege a series through March 2, 1994.

By Order dated April 22, 1996, the Director of the Division of Workers Compensation determined that an emergency existed and Special Administrative Law Judge Douglas F. Martin was appointed to issue awards in these two docketed claims. A decision was entered May 21, 1996, whereby claimant was awarded 23.47 weeks of temporary total disability compensation and permanent partial disability compensation based upon a 32 percent disability to the body as a whole. Claimant was further awarded medical benefits including unauthorized medical and future medical treatment upon proper application to and approval by the Director. Reporter fees and expenses, as well as the Special Administrative

Law Judge fee, were assessed against “the respondent and insurance carrier.” The Award does not specify under which docket number the Award was entered nor does it specify which insurance carrier shall be responsible for payment of said award. However, since the Special Administrative Law Judge only found claimant to have sustained injury as a result of her July 26, 1992, accident, with subsequent incidents which were found to be temporary exacerbations of the earlier injury and which did not result in any additional permanent disability, it is apparent that all of the Award was intended to be in Docket No. 189,073.

The issues listed in the Award were not separated as to docket number. On appeal, the parties raised the following issues:

In Docket No. 189,073 claimant raised the issue of nature and extent of disability. Claimant also raised the issue of the allocation of temporary total disability compensation paid claimant as between the two docketed claims and thus as between the two insurance carriers. The Fund requests that its attorney fees be paid by respondent and INA. The liability of the Fund was listed as an issue in the Award. The Special Administrative Law Judge found that the Fund was not liable for any portion of the award. However, the Award was silent as to the Fund’s request for its attorneys fees.

In Docket No. 189,687 the issues are: (1) whether claimant sustained personal injury by accident on the dates alleged; (2) whether said accident or accidents arose out of and in the course of her employment with respondent; (3) the nature and extent of claimant’s disability; (4) the allocation of temporary total disability compensation paid as between the two docketed claims; (5) notice; and (6) Fund liability.

At the August 2, 1995, regular hearing it was announced that respondent and INA paid claimant “temporary total disability compensation from July 28, 1992, to September 14, 1992,” (a period of 7 weeks), “at the rate of \$173.50 per week in the sum of \$1,725.71” in Docket No. 189,073 and that there was a second period of payment of temporary total from May 13, 1994, to July 15, 1994 (a period of 9.14 weeks). In Docket No. 189,687 it was announced that “28-and-a-half weeks were paid and the weekly rate was \$187.45 and the total was \$1901.06.” This was the amount of temporary total disability compensation payments said to have been paid by respondent and PHICO. No claim was made for any additional temporary total disability compensation in either claim. However, counsel for claimant announced that although temporary total disability compensation was no longer requested after July 11, 1994, as of the date of the regular hearing on August 2, 1995, claimant was still receiving temporary total disability compensation payments from respondent and PHICO in Docket No. 189,687. Counsel for claimant also agreed that a credit for overpayment of temporary total disability compensation could be taken against any award for permanent partial disability compensation.

In the May 10, 1996, submission letter of the Kansas Workers Compensation Fund, it is alleged the parties entered into a stipulation in Docket No. 189,073 that “claimant was paid temporary total disability compensation from July 26, 1992 to September 14, 1992 at the rate of \$173.50 per week in the sum of \$1,725.71” and in Docket No. 189,687

“temporary total disability compensation was paid at the rate of \$187.45 per week for 28.5 weeks, from 5-13-94 until 7-15-94.” Respondent and PHICO in its March 6, 1996 submission letter to the Administrative Law Judge alleged under Docket No. 189,687 “respondent has paid 23.47 weeks of temporary total compensation at a weekly rate of \$187.45 for a total of \$4,400.06.” Without explanation the Special Administrative Law Judge awarded 23.47 weeks of temporary total disability compensation at the rate of \$176 per week.

The Brief of Appellant/Claimant states that respondent and INA “paid temporary total compensation from July 28, 1992 to September 14, 1992 at the rate of \$173.50 per week. The total paid was \$1,725.51” and that respondent and PHICO “paid 28.5 weeks of temporary total disability compensation at the weekly rate of \$187.45 for a total of \$1,901.06.” There was no allegation by claimant of there having been an underpayment or an overpayment of temporary total disability compensation. However, according to claimant, there was an issue as to the allocation of temporary total disability benefits as between the two insurance carriers. During oral argument to the Appeals Board, respondent and PHICO announced that they were not seeking reimbursement for any overpayment of temporary total disability compensation nor were they seeking any reimbursement for any medical benefits paid. The parties agreed that the amount of temporary total disability compensation due was not an issue for review. Therefore, the Appeals Board will adopt the finding of the Special Administrative Law Judge with regard to the number of weeks for which temporary total disability compensation is due. All other findings and orders by the Special Administrative Law Judge which are not raised as issues by the parties on review will likewise be adopted by the Appeals Board for purposes of its review and award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record and considered the briefs and arguments of the parties, the Appeals Board makes the following findings and conclusions:

Docket No. 189,073 involves the personal injury by accident on July 26, 1992, which is admitted. At the time of her regular hearing testimony, claimant was a 61-year-old high school graduate with a certified nurse’s aide certificate and a home health certificate. She had worked for Atchison Hospital as a nurse’s aide from 1964 until May 1983 and then again from 1988 until March 2, 1994. On July 26, 1992, she was injured while attempting to get a patient out of bed and into a wheelchair. The patient was disoriented and was fighting her. As claimant and another aide were getting him up, the patient grabbed claimant’s arm and twisted it behind her back. Claimant’s immediate onset of pain was to the top of her left shoulder. She was off work for approximately six weeks until sometime in September of 1992. She continued to perform her regular job duties but with periodic episodes of shoulder pain.

On February 1, 1993, claimant was changing a bed when the patient in the bed began pushing away from the bed railing causing strain on claimant’s left shoulder. The

area of pain was the same as with the July 1992 injury. She again received medical treatment for the shoulder and was given a 25-pound weight restriction by Dr. Shriwise. Claimant was transferred to a light-duty job which allowed her to work within that restriction. Claimant testified that her shoulder pain would increase and decrease depending upon her activity. It is not clear whether her level of pain returned to that which she had prior to the February 1993 aggravation. However, claimant testified that her condition gradually deteriorated to the point where in March of 1994 claimant determined that she could no longer continue her work. Docket No. 189,687 applies to this alleged series of aggravations.

Claimant returned to Dr. Eplee who took her off work and referred her to Dr. Bruce I. Tetelman. Dr. Tetelman placed a 25-pound lifting restriction on her and also restricted overhead lifting and limited repetitive movement of her neck. Respondent did not have work available within these restrictions and claimant has been unable to return to work with respondent. At the time of regular hearing she was still not working.

Also, in November of 1993 claimant slipped and fell on some ice, hitting the back of her head and shoulder area. This took place away from the work premises and was not work related. She did take some time off work at that time but denies that it was necessary because of the slip-and-fall injury. She had a stiff neck and shoulder which she described as being in a different area from her previous areas of pain. Claimant denies having any lasting effects from the slip-and-fall injury.

As stated above, the Special Administrative Law Judge apparently intended all of claimant's benefits to be awarded under Docket No. 189,073. The accidents and injuries occurring after July 26, 1992, were found to be temporary aggravations only, which did not result in any additional impairment of function or disability. Claimant filed two separate docketed claims alleging two specific accident dates followed by a series of injuries culminating on March 2, 1994, claimant's last day of work. In her brief, counsel for claimant argues in support of the finding by the Administrative Law Judge apportioning all of the claimant's disability to the first accident. "All the doctors that have testified indicate that Josephine Rivers had the initial injury in July of 1992 and then several subsequent exacerbations or aggravations of her condition. The issue in this case is not whether she met with personal injury by accident on the dates alleged, rather it is whether these accidental injuries lead to any permanent impairment of function." Brief of Claimant to the Administrative Law Judge, at 6.

In the Brief of Appellant/Claimant to the Appeals Board, it is specifically stated "Under Docket Number 189,687, the Administrative Law Judge found that the date of accident of February 1, 1993 and the series of injuries thereafter through March 2, 1994, were merely temporary exacerbations. Claimant does not dispute this finding." As would be expected, respondent and PHICO Insurance Company and the Fund likewise do not dispute this holding by the Special Administrative Law Judge. Only respondent and INA argue for a finding of permanent aggravation after July 26, 1992.

While it is true that claimant was able to return to her former position with respondent after the first accident, claimant was not symptom free. However, the medical evidence is not as unanimous as claimant's counsel would have us believe with regard to all of claimant's disability being attributable to the first injury. Nevertheless, the greater weight of the credible evidence does support this finding and the Appeals Board affirms the finding of the Special Administrative Law Judge in this regard. This finding is that the February 1, 1993, incident and subsequent aggravations of symptoms were a natural consequence of the July 26, 1992, accident. The Appeals Board does not find a separate and distinct accidental injury occurred on February 1, 1993, or thereafter. Accordingly, all medical treatment and periods of temporary total disability subsequent to the July 26, 1992, accident would be the responsibility of respondent and INA under Docket No. 189,023. Likewise, since the February 1, 1993, injury was a temporary aggravation only and did not result in any permanent aggravation of the claimant's disability, the entire responsibility for permanent partial disability is likewise the responsibility of respondent and INA.

With regard to the Fund's attorney fees in Docket No. 189,073, the Appeals Board finds that such an award would be appropriate. However, the record does not contain adequate information upon which to make a determination as to the amount of a reasonable attorney fee. Also, as counsel for respondent and INA points out, as these two docketed claims were litigated together, the time spent by the Fund in Docket No. 189,073 would, to a large extent, have also been spent in Docket No. 189,687. Therefore, the issue of a reasonable attorney fee, including for time spent in connection with this appeal, should first be presented to the Administrative Law Judge for hearing and determination.

The final issue then for determination is the nature and extent of claimant's permanent partial disability in Docket No. 189,073. As indicated, claimant was given permanent restrictions which were not accommodated by respondent such that her last date of work for respondent was March 2, 1994. With respect to the claimant's claim for work disability after that date, the Special Administrative Law Judge noted that the record is deficient as to what efforts claimant has made to find employment. However, respondent has not argued nor did they present evidence to show that claimant's efforts were insufficient in this regard. Accordingly, the public policy principles set forth in Foult v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995) have not been shown to apply to the facts and circumstances of this case. Claimant is entitled to a work disability in excess of her percentage of functional impairment.

K.S.A. 1992 Supp. 44-510e provides in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment."

The Special Administrative Law Judge found a 32 percent work disability by averaging a 16 percent wage loss with a 48 percent loss of ability to perform work in the open labor market. The only expert vocational testimony was given by Dick Santner. Claimant agrees with the Special Administrative Law Judge's finding of a 48 percent loss of her ability to perform work in the open labor market when using Dr. Koprivica's restrictions. However, when Mr. Santner utilized the restrictions recommended by Dr. Carabetta he found an 89 percent reduction in claimant's ability to perform work in the open labor market. Averaging the two figures would result in a 68.5 percent labor market loss.

Claimant further argues that Mr. Santner determined a loss in claimant's wage-earning capacity of between 13 and 32 percent based upon a current wage-earning capability of between \$4.47 per hour and \$5.74 per hour, compared to claimant's average weekly wage of \$264. The Special Administrative Law Judge found a 16 percent wage loss without much explanation as to how he arrived at that particular percentage. In the absence of compelling evidence to do otherwise, the Appeals Board will select the median of Mr. Santner's testimony with regard to the range of losses as to both components of the work disability formula. Averaging the 22.5 percent reduction in claimant's wage-earning capacity with a 68.5 percent loss in claimant's ability to perform work in the open labor market yields a work disability of 45.5 percent.

The functional impairment ratings range from 6 percent by Dr. Shriwise to 15 percent by Dr. Koprivica. Dr. Carabetta's opinion was at 9 percent to the body as a whole. The Appeals Board finds 10 percent to be the amount of claimant's functional impairment.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the claimant is denied compensation in Docket No. 189,687 and the Award entered by Special Administrative Law Judge Douglas F. Martin dated May 21, 1996, in Docket No. 189,073 should be, and is hereby modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Josephine Rivers, and against the respondent, Atchison Hospital, and its insurance carrier, Insurance Company of North America, for an accidental injury which occurred July 26, 1992, and based upon an average weekly wage of \$264.00 for 23.47 weeks of temporary total disability compensation at the rate of \$176 per week or \$4,130.95 followed by 59.96 weeks of permanent partial disability compensation at the rate of \$17.60 per week or \$1,055.30, for a 10% permanent partial disability, through March 2, 1994, followed by 331.57 weeks at the rate of \$80.08 per week or \$26,552.13 for a 45.5% permanent partial disability, making a total award of \$31,738.38.

As of January 31, 1997, there is due and owing claimant 23.47 weeks of temporary total disability compensation at the rate of \$176 per week or \$4130.95, followed by 59.96 weeks of permanent partial compensation at the rate of \$17.60 per week in the sum of \$1,055.30 followed by 152.28 weeks of permanent partial disability at the rate of \$80.08 per week in the sum of \$12,194.58 for a total of \$17,380.83, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$14,357.55 is to be paid for 179.29 weeks at the rate of \$80.08 per week, until fully paid or further order of the Director.

Claimant shall be entitled to future medical treatment upon proper application to, and approval by the Director.

Claimant is entitled to reimbursement for unauthorized medical expenditures of up to \$350.

Pursuant to K.S.A. 1992 Supp. 44-536, the claimant's contract of employment with her counsel is hereby approved.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier, Insurance Company of North America, as follows:

Appino & Biggs Reporting Service	
Deposition of Dick Santner	\$206.70
Deposition of John R. Eplee, M.D.	\$240.10
Deposition of Josephine Rivers	\$224.10

Gene Dolginoff Associates, LTD.	
Deposition of P. Brent Koprivica, M.D.	\$447.50
Deposition of P. Brent Koprivica, M.D.	\$335.85
Richard Kupper & Associates	
Deposition of Thomas L. Shriwise, M.D.	\$418.35
Nora Lyon & Associates	
Transcript of the regular hearing of August 2, 1995	\$247.60
Metropolitan Court Reporters, Inc.	
Deposition of Vito J. Carabetta, M.D.	\$316.10
Special Administrative Law Judge Fee	\$150.00

IT IS SO ORDERED.

Dated this ____ day of January 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jan L. Fisher, Topeka, KS
Marcia L. Yates, Kansas City, MO
Jeffrey S. Austin, Overland Park, KS
Darin M. Conklin, Topeka, KS
Douglas F. Martin, Special Administrative Law Judge
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director